

## STIPULATIONS

The stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

### ISSUES

1. What is the nature and extent of claimant's injury and disability?

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

On July 16, 1991, claimant, while working for the respondent, was obliged to push a wheelbarrow out from underneath a large bin. Claimant, in 1990, had suffered back problems and as a result had been under a fifty (50) pound weight restriction by the treating physician, Dr. John Wertzberger. Claimant testified that the process of moving the wheelbarrow did not violate the restrictions of Dr. Wertzberger as he did not actually pick up the wheelbarrow but simply slid it forward. Unfortunately, while performing this activity claimant suffered an aggravation of his pre-existing back condition.

Claimant had switched from mill operator to lab technician in approximately January 1991 due to this pre-existing back injury. Subsequent to July 16, 1991, Dr. Mark Bernhardt, the board-certified orthopedic surgeon in charge of claimant's ongoing treatment, restricted claimant to single lifts of thirty-five (35) pounds and occasional lifts of twenty (20) pounds, with no bending, twisting, or repetitive lifting allowed. He also opined that claimant should alternate between sitting and standing and felt sedentary work would be in claimant's best interest. With these restrictions claimant was prohibited from returning to his employment with the respondent.

Claimant was placed in a vocational rehabilitation training program with the recommendation he be retrained as an electrician. Mr. Michael Dreiling, the only vocational rehabilitation expert to testify in this matter felt that this plan was not appropriate for the claimant as the medical restrictions placed upon him by Dr. Bernhardt were not appropriate to this field of employment. He was of the opinion that claimant was retrainable. Mr. Dreiling felt that, based upon the restrictions of Dr. Bernhardt, claimant had suffered a forty percent (40%) loss of access to the open labor market. He also felt that claimant had suffered a loss of ability to earn a comparable wage of forty-six to fifty-eight percent (46-58%) which the Appeals Board finds comprises a fifty-two percent (52%) loss of ability to earn comparable wages.

Mr. Dreiling did opine that claimant, for all practical purposes, was unemployable as he was restricted significantly by Dr. Bernhardt's alternating sitting and standing recommendation.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 1991 Supp. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant's burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212; rev. den. 249 Kan. 778 (1991).

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds that, based upon a review of the entire record, claimant has proven an inability to return to work for wages comparable to the average gross weekly wage that he was earning at the time of the injury. Thus the presumption of K.S.A. 44-510e has been overcome and claimant is entitled to a work disability. The dispute is whether claimant is entitled to a forty percent (40%) loss of access to the open labor market, per the restrictions of Dr. Bernhardt, or a one-hundred percent (100%) loss of access to the open labor market, per the personal opinion of Michael Dreiling. Both opinions are supported by some evidence with neither being sufficiently persuasive to sway the Appeals Board's opinion in favor of one over the other. As such the Appeals Board finds claimant has suffered a loss of access to the open labor market of seventy percent (70%).

The Appeals Board finds that the claimant's loss of access to the open labor market and loss of ability to earn a comparable wage should be given equal weight and, therefore, claimant has suffered a work disability of sixty-one percent (61%). This analysis is in accordance with the decision of Hughes v. Inland Container, 247 Kan. 407, 799 P.2d 1011 (1990), wherein the Kansas Supreme Court held that permanent partial general disability is to be determined by the extent of the reduction of an employee's ability to perform work in the open labor market and the employee's ability to earn comparable wages. The Court held that both factors must be considered in light of the employee's education, training, experience and capacity for rehabilitation.

The Court of Appeals in Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. den. 250 Kan. 806 (1991), held that the requirements of Hughes necessitates the use of some kind of mathematical equation, and it was not error to give greater weight to one factor than the other. Averaging the two factors is appropriate here as there exists no compelling reason to give greater weight to one factor over the other.

In his Award, Special Administrative Law Judge Morrissey found the Kansas Workers Compensation Fund to be responsible for one-hundred percent (100%) of all compensation, medical expenses, and administrative costs assessed in this matter. The Workers Compensation Fund, in arguing this case, did not contest the one-hundred percent (100%) liability assessed by Special Administrative Law Judge William F. Morrissey and said finding will not be disturbed by the Appeals Board.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey shall be, and hereby is, modified in that the claimant, David E. Witter, is awarded compensation against the respondent, Atchison Casting Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund for an accidental injury arising out of and in the course of claimant's employment on July 16, 1991, and based upon an average weekly wage of \$525.91, for 110 weeks temporary total disability compensation at the rate of \$289.00 per week in the sum of \$31,790.00 followed by 305 weeks of permanent partial disability compensation at the rate of \$213.88 per week in the sum of \$65,233.40 for a 61% permanent partial general body work disability making a total award of \$97,023.40.

As of April 17, 1995, there is due and owing claimant 110 weeks of temporary total disability compensation at the rate of \$289.00 per week in the sum of \$31,790.00 followed thereafter by 85.86 weeks permanent partial general body disability at the rate of \$213.88 in the sum of \$18,363.74 totalling \$50,153.74 which is due and owing in one lump sum less any amounts previously paid. Thereafter, claimant is entitled to 219.14 weeks of permanent partial general body work disability at the rate of \$213.88 per week, totalling \$46,869.66 until fully paid or further order of the Director.

Future medical benefits are awarded upon proper application to and upon the approval of the Director.

Unauthorized medical expense of up to \$350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of said expense.

All compensation, medical expenses and costs in this matter are to be borne by the Kansas Workers Compensation Fund. Any funds expended by the respondent in this matter up to this point are to be reimbursed by the Kansas Workers Compensation Fund to the respondent.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are assessed to the Kansas Workers Compensation Fund to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Curtis, Schloetzer, Hedberg, Foster & Associates Transcript of Regular Hearing	\$251.35

Gene Dolginoff & Associates	
Deposition of Mark Bernhardt, M.D.	\$432.60
Deposition of Michael Dreiling	\$444.20

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 1995.

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BOARD MEMBER

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c: Mark S. Gunnison, Overland Park, KS  
Larry R. Mears, Atchison, KS  
W. Frederick Zimmerman, Kansas City, KS  
William F. Morrissey, Special Administrative Law Judge  
George Gomez, Director